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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

ANGEL SANTIAGO,
Petitioner,

V.

K-SIX TELEVISION, INC., DEVIN HELMES, AMANDA SALINAS, ANAHI GARCIA, DAVID CORTEZ, JUAN ZAMORA, ALFONSO HOLGUIN, JUAN RAMIREZ, AND PAUL RAYMOND BUITRON, III.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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ISSUE

Section 51.014(a)(6) of the Texas Civil Practice & Remedies Code allows a media defendant an immediate interlocutory appeal from a denial of their motion for summary judgment. This procedural protection for the media is granted in addition to the substantive protections embodied in *New York Times Co. v. Sullivan and Gertz v. Robert Welch, Inc.* Does the Texas statute impermissibly re-balance the respective interests of libel litigants?

If so, does the re-balancing invade petitioner's 'strong and legitimate' interests as marked-out by the First and Fourteenth Amendments to the Constitution?

LIST OF PARTIES

Petitioner certifies that the following is a list of all parties and all counsel in this matter.

1.) Petitioner is Angel Santiago, who is the plaintiff below. The attorney representing Petitioner is:

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Edward P. Fahey, Jr.
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2.) Respondents in this case are: K-Six Television, Inc., Devin Helmes, Amanda Salinas, Anahi Garcia, David Cortez, and Juan Zamora. All are represented by:

The Rangel Law Firm, P.C.
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3.) The non-media defendants in this case are: Alfonso Holguin, Juan Ramirez, and Paul Raymomd Buitron III. They are not parties to the appeal complained of in this petition. Holguin and Ramirez are represented by:

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1420 San Bernardo Ave.
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Buitron III is represented by:

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OPINIONS BELOW

The order of the Supreme Court of Texas was issued without opinion. The order is reprinted in Appendix, Tab B.

The opinion and order of the Texas Fourth Court of Appeals, reversing the denial of K-Six' motions for summary judgement, and rendering judgement that plaintiff take nothing is reported at: *K-Six Television, Inc. v. Santiago,* No. 04-01-00592-CV, __S.W.3d__(Tex. App.–San Antonio Feb. 13, 2002, mand. denied). The opinion and order are reprinted in Appendix, Tab C.

PRELIMINARY STATEMENT

Santiago brings this petition because a statute[1] in the State of Texas is repugnant to the U.S. Constitution. The validity of the statute was drawn into question by Santiago in his petition for writ of mandamus at the Texas Supreme Court.[2] The statute conflicts with this Court's decisions in *New York Times Co. v. Sullivan,*[3] *Gertz v. Robert Welch, Inc.,*[4] and *Calder v. Jones.*[5] As a result, Texas is out-of-line with the rest of the nation in adhering to the Constitution. Under the federal Constitution, the charge of this Court is to ensure that laws made "in pursuance of"[6] the Constitution are supreme, and are uniform throughout the country.[7]

BASIS FOR JURISDICTION

1. The order complained of in this petition was entered by the Supreme Court of Texas on March 19, 2002.[8]

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1 See page 3-5, *infra*.

2 Appendix Tab A.

3 376 U.S. 254 (1964).

4 418 U.S. 323 (1974).

5 465 U.S. 783 (1984).

6 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 180 (1803).

7 *McKesson Corp. v Florida Alcohol & Tobacco Div.,* 496 U.S. 18, 28-29 (1990) (quoting *Martin v. Hunter's Lessee,* 1 Wheat. 304, 340 (1816)).

8 Appendix Tab B.

2. No motions for rehearing were filed.

3. Jurisdiction of the Court is proper under 28 U.S.C. 1257(a).

4. In this case, 28 U.S.C. §2403(b) may apply. Therefore, notifications to the Attorney General of the State of Texas were made, as required by this Court's Rule 29.4(c).

THE STATUTE COMPLAINED OF

TEXAS CIVIL PRACTICE AND REMEDIES CODE
Vernon's Texas Codes Annotated, (Vol. 3, 1997)(cumulative annual pocket part, 2002).

§ 51.014. Appeal From Interlocutory Order

(a) A person may appeal from an interlocutory order of a district court, county court at law, or country court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary, injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgement that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgement that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedured, except in a suit brought under the Family Code; or

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.

(c) A denial of a motion for summary judgement, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay of the commencement of trial under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

(2) the 180th day after the date the defendant files:

(A) the original answer;

(B) the first other responsive pleading to the plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a) (5), (7), or (8), the responsive pleading that raised that defense.

(d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) the parties agree to the order.

(e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.

(f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

STATEMENT OF THE CASE

1. The Facts

For nine years preceding the month of June 2000, Angel Santiago was president of the Laredo Amateur Boxing Club. He served in that position as a volunteer. The purpose of the club is to provide organized athletic activity to disadvantaged youth in Laredo, Texas. The LABC is a private, not-for-profit corporation, and is funded in part by the United Way.

Santiago resigned his position in June 2000. Soon thereafter, three coaches at the club began to accuse Santiago of mishandling the club's money. The Board of Directors of the club held a meeting where the complaints were aired. Santiago answered the accusations to the complete satisfaction of the Board. The Board at that time consisted of a State District Judge, several attorneys, and a Certified Public Accountant. The Board meeting seemed to have put the matter to rest.

But, three months later, the coaches appeared on television and accused Santiago again, this time of stealing $15,000 of the club's money. The 'exclusive' news report[9] was carried by KVTV-Channel 13, owned by K-Six Television, Inc.

2. The Proceedings Below

Santiago filed suit in state court for defamation against the coaches, K-

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9 Appendix Tab C. The full text of the news report is printed in the Fourth Court of Appeals opinion at *K-Six Television, Inc. v. Santuiago,* No 04-01-00592-CV, __S.W.3d__, (Tex. App.-San Antonio Feb. 13, 2002, mand. denied).

Six Television, Inc., and its employees who were involved in preparing the news report. The suit alleges: a) libel and slander by the coaches, b) republication of the libel by K-Six, and c) a separate libel by K-Six and its employees. Because the theft of $15,000 is a crime punishable by imprisonment in Texas, Santiago also alleged libel *per se*.

After discovery, K-Six moved for summary judgement under two Texas rules. One was a 'traditional' motion,[10] where the burden is on the movant alone, and the second was a 'no-evidence' motion,[11] similar to the federal counterpart in the *Celotex Corp. v. Catrett*,[12] where the burden of proving falsity, for example, shifts to the non-movant. Santiago defeated both of K-Six' motions.[13]

Under the general rules of Texas practice, Santiago's case would then have gone to trial. But K-Six availed itself of the Texas interlocutory appeals statute, which gives media defendants the right to immediate and accelerated review of the trial court's denial. Santiago challenged K-Six' appeal on the ground that K-Six had not complied with the statute's requirements. The Fourth Court of Appeals, however, found its jurisdiction proper, reversed the trial court's denial of K-Six' motions for summary

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10 Tex. R. Civ. P. 166a(c).

11 Tex. R. Civ. P. 166a(i).

12 477 U.S. 317 (1986).

13 Appendix Tab D, E, and F.

judgment, and rendered judgment that Santiago take nothing. [14] This result is not uncommon now in Texas libel cases:

> Interlocutory appeals from denials of summary judgement have proven very effective in disposing of unmeritorious libel claims. Since the law was enacted in 1993, 20 interlocutory libel-related appeals have been reported by the Texas Courts of Appeals., Five of those cases were disposed of on procedural grounds. Of the 15 cases to reach the merits, 13 cases resulted in judgements for media defendants, while only two claims were found possessing sufficient merit to be remanded for trial. [15]

Therefore, only 10% of libel claims survive interlocutory review. Before the statute was enacted, 25% of libel claims survived post-trial appellate review.[16]

3. Federal Issue Is Raised Below

Santiago filed a motion for rehearing in the intermediate appellate court.[17] It was denied. Next, Santiago filed a petition for writ of

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[14] Note 9, *supra*.

[15] Ford, J., and Ogden, B., "The Texas Case Law Experience Under the Statute," 2 *LDRC Bulletin* (quarterly newsletter of the Libel Defense Resource Center, Inc.) 11 (July 1999).

[16] Note 39, *infra*, Tr. 17:8-11

[17] Appendix Tab G.

mandamus with the Supreme Court of Texas.[18] The petition was based solely upon the improper exercise of jurisdiction by the appellate court. The petition was grounded, partly, in a state law claim that jurisdiction under the Texas statute is not proper unless the media defendant make specific reference to some constitutional protection of free speech. The petition was also grounded on a federal constitutional claim. This is the stage of proceedings where the federal question was first raised by Santiago.

Santiago's federal claim was put forth in the last section of his petition, entitled, "Constitutional Argument-Harm Done to Santiago."[19] The first half of the argument relates to the Texas Constitution, while in the second, it was pressed upon the Court that the judicial dicta in *Calder v. Jones* states that "special procedural protections" for defamation defendants have repeatedly been denied by the U.S. Supreme Court.[20] And, that the "chilling effect" of such lawsuits on the media has already been taken into account in the substantive law of the First Amendment.[21] In other words, the enhanced burden on libel plaintiffs as to fault and falsity, derived from *Sullivan and Gertz,* are all the protections the media gets.

The Texas Court was also shown that the U.S. Constitution does not require any special rules to apply at summary judgement in a defamation

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18 Appendix Tab A.

19 Appendix Tab A.

20 465 U.S. 783, 790-91 (1984).

21 *Id.*

case. [22] Based on these arguments, Santiago asserted that the Texas statute, in light of *Calder*, is "superfluous" and "a form of overkill." This was the method by which Santiago raised his federal claim in the Supreme Court of Texas.

It is true Santiago employed no particular words, such as: 'unconstitutional,' 'equal protection,' or 'due process' in his petition. But this Court has held:

> [I]t is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, 'no particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.'[23]

Thus, Santiago raised the federal issue when he directly cited the Texas Court to *Calder* for the proposition that the Texas statute impermissibly goes beyond the protections for the media set out in *Sullivan and Gertz*.

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22 *Id.*

23 *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.5 & 85 n.9 (1980) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

4. Texas Court's Ruling Was Not Based on an Adequate and Independent State Ground

The Texas Supreme Court "passed on"[24] Santiago's federal question when it denied his petition without opinion.[25] Therefore, in this case, as in *Michigan v. Long,*[26] the state ground is not apparent from the four corners of the opinion. Neither is there a plain statement that the decision below rested on an adequate and independent state ground.[27] And, unless the Texas Constitution provides more protection to free speech rights than the U.S. Constitution, there could have been no state grounds upon which the Texas Court relied.

In *Turner v. KTRK Television, Inc.,* [28] a public-figure libel case, the Texas Supreme Court noted:

> while we have occasionally extended protections to defamation defendants greater than those offered by the United States Constitution, we have based those protections on the common law, not the Texas Constitution. Nothing in the language or purpose of the Texas Free Expression Clause [29] authorizes us....to afford greater weight in the balancing of interests to free expression than we would under the First Amendment...

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24 *Illinois v. Gates,* 462 U.S. 213, 219 (1978).

25 Appendix Tab B.

26 463 U.S. 1032, 1040 (1980).

27 463 U.S. at 1044.

28 38 S.W.3d 103, 117 (Tex. 2000).

29 "Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of the privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." Tex. Const. art I,§8.

Thus, the Texas Free Expression Clause is co-extensive with the First Amendment, and there was no adequate and independent state ground that supported the Texas Court's decision. Therefore, the opinion below "fairly appears to rest primarily on federal law."[30] And this Court has jurisdiction over Santiago's Appeal.

5. Legislative History of the Texas Statute

The offensive part of the Texas statute is subsection (a)(6).[31] This subsection was passed into law as Senate Bill 76 in 1993. Before, Texas had allowed interlocutory appeals only in the limited circumstances reflected in subsections (a)(1) through (a)(5). [32]

The impetus for the new legislation was a recognition by some in the Texas media that "litigation costs" in libel cases were too high. Indeed, in the year previous to the statute's enactment, A.H. Belo Corp.---owner of the *Dallas Morning Times*--- was subject to a $58MM libel judgement.[33] "Belo decided some innovative relief was in order."[34] Belo formed "an influential coalition of print and broadcast companies,"[35] soon to be know as the Appellate Fairness Coalition. Then Belo hired "three excellent

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30 463 U.S. at 1042.

31 p. 3-4, *supra.*

32 p. 3, *supra.*

33 McCarthy, M., "Texas Libel Interlocutory Appeal Statute," 2 *LDRC Bulletin* 3 (July 1999).

34 *Id.*

35 *Id.*

government relations lawyers," who pushed the bill to the top of the 73rd Legislature's agenda.[36]

In order to obtain their "innovative relief," Belo's General Counsel took some innovative steps:

> We also contacted several members of the Texas Supreme Court, and a few well-known trial lawyers, who were part of a special Supreme Court Rules Committee charged with suggesting streamlined civil procedure rules. From the committee's standpoint, the most attractive aspect of the proposed interlocutory appeal legislation was that it would permit appellate courts to eliminate claims which have constitutional or other legal infirmities prior to the public expense of a full trial. The Rules Committee saw no problem with the legislation, although it did not, understandably, enter the legislative fray on the bill.[37]

Senate Bill 76 was sponsored by then State Senator Jim Turner, now a U.S. Congressman. According to Senator Turner:

> the whole purpose of the amendment is to try to remove the chilling effect that would naturally exist against the exercise of the freedom of the press that we all know that we all believe in, but to remove the chilling effect is brought about by the fact that when suits are brought against the media, it can result in protracted litigation that even though the media is certainly going to be protected ultimately on appeal based on the Constitutional protection, they have to go through all this lengthy litigation to get there.[38]

The crux of Senator Turner's argument was: if you're sure to loose anyway,

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36 *Id.* at 4.

37 McCarthy, note 33, *supra,* at 4.

38 See note 39, *infra,* Tr. 12:3-12

better to loose sooner rather than later.

The Senate State Affairs Committee held hearings on February 17, 1993.[39] Four media witnesses testified in favor of the bill.[40] No one testified in opposition; according to the bill's co-sponsor, "because nobody signed up."[41] We are told by Belo's E.V.P. and General Counsel that: "there is no libel plaintiff's bar in the state of Texas or any organized group of libel lawyers. The Texas Trial Lawyers' Association therefore, had no significant constituency to protect."[42]

Senators raised pointed questions at the hearing. Senator Lucio wanted to know how many libel cases are filed in Texas each year. "Between twenty-five and thirty cases were filed in Texas in 1992," came the answer from Robert Deckert, C.E.O. of Belo Corp.[43] These thirty defamation actions contrast with 46,762 tort cases filed in Texas district courts during the same year.[44] Yet, the Senators were told that the main thrust behind the

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39 Appendix Tab H contains the full transcript of the Committee Hearings.

40 Tr. 7:5-8:2

41 Tr. 67:5-8

42 McCarthy, *supra,* note 33, at 3.

43 Tr. 20:13-15

44 National Center for State Courts, *Court Statistics Project* (1999) (available at <http://www.ncsc.dni.us/divisions/research/csp/csp-frd.htm>). *See* Appendix Tab I.

bill was to enhance "the efficient administration of justice."[45]

Senators Carricker, Leedham, and Sibley wanted to know why they, as individuals, or any individual asserting free speech rights, could not take advantage of the statute; and if the statute was not creating "a special class of people."[46] The response was: "we don't want to open the floodgates of appeals and allow people to---to try and manipulate the system just to get under this...procedure."[47]

The Senators were misinformed by the witnesses in some instances:

- [In] *Sullivan*, the Supreme Court of the United States established very high procedural burdens for the vast majority of libel plaintiffs, to meet before a media defendant even goes to trial. The Court's decisions contemplated that a determination of whether or not these burdens could be met should occur at the summary judgment stage;[48]

- What we're experiencing in Texas is that media defendants..are required to incur very substantial and oftentimes ruinous expenses just in order to defend our right not to be tried at all...[49]

Senator West asked: "How many of the states have similar statutes which allows [sic] for interlocutory appeals in similar situations?" The answer was misleading. "Nearly one-half of the other States, as well as the

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45 Tr. 29:15-17, Kirte Kinser, First Amendment lawyer testifying in support of the bill as a "resource witness."

46 Tr. 10:24--11:5; 42:10-15; and 44:8-16

47 Tr. 44:25--45:4

48 Tr. 18:1-8

49 Tr. 18:17-23

Federal courts, allow interlocutory appeals under some form or another, so we are certainly not the trailblazer."[50] The fact is, that no other state statute permits interlocutory appeals that are specifically targeted to benefit media defendants.[51]

Besides Texas, only two state statutes allow defendants to appeal a denial of summary judgment: New York[52] and Arkansas.[53] But in these states, the interlocutory appeal is given 'as of right,' and extends to all litigants, in all cases. The Arkansas and New York statutes are thus benign on their face, because they create no classifications, and do not discriminate against the parties on any basis.

ARGUMENT

1. The Nature of Petitioner's Interest

The nature of Santiago's interest in this case has never been better stated than by Justice Stewart in his concurring opinion in *Rosenblatt v. Baer*.[54]

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being–a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of

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50 Tr. 28:19-29:3

51 Appendix Tab J.

52 Appendix Tab K.

53 Appendix Tab L.

54 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

> life itself, is left primarily to the States under the Ninth and Tenth Amendments. But that does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

This statement has been quoted with approval by the majorities in *Gertz v. Robert Welch, Inc.*,[55] *Dun & Bradstreet, Inc. v. Greenmoss Builders*,[56] and *Milkovich v. Lorrain Journal, Co.*[57] It has been cited with equal frequency by dissenting and concurring Justices in this line of cases.[58] Therefore, the idea expressed is not just aspirational. It has the force of reason behind it.

The statement has well-served this Court as an articulation of the interest that competes with society's need for "uninhibited, robust, and wide-open debate on public issues"---the value at the center of First Amendment protections.[59] The words echo Justice Cardozo's true talismanic phrase in *Palko v State of Connecticut*, that fundamental rights are those "found to be implicit in the concept of ordered liberty."[60]

The essence of this Court's decisions in *Sullivan* and progeny has been to preserve the concept of 'ordered liberty' in the field of free expression. Liberty, on one side of the equation, being commanded by the First

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55 418 U.S. at 341.

56 472 U.S. 749, 757-58 (1985).

57 497 U.S. 1, 22-23 (1990).

58 *Gertz*, 418 U.S. at 402 (White, J., dissenting); *Philadelphia Newspapers v Hepps*, 475 U.S. 767, 780 (Stevens, J. dissenting).

59 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

60 302 U.S. 319, 324-25 (1937).

Amendment, and order, on the other side of the equation, being commanded by a recognition that the freedom of speech is not absolute.[61] Thus, many times, it has been said by this Court that the rules of *Sullivan and Gertz* developed as the result of "an accommodation" between the two competing rights.[62]

'Ordered liberty' is therefore liberty constrained. Constrained not only by Santiago's right to protect his reputation, but also by society's general need for order, peace, and happiness.[63]

In the common-law, allowing an injured person to bring a slander or libel action was a substitute for something. It was the substitute for a brawl, a duel, or some other violent self-help measure, which would "tend to incite an immediate breach of the peace."[64] Today, society has no less a need to maintain the peace. Therefore, to allow Santiago a forum for redress serves also to protect the general weal. Yet it seems in this case, the State of Texas has abdicated its traditional role under the Ninth and Tenth Amendments to protect the private personality, and to protect life itself.[65]

The Texas statute impermissibly imposes yet more burdens on

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61 *Gertz,* 418 U.S. at 341.

62 *Gertz,* 418 U.S. at 341-42.

63 Pound, R., "Interests of Personality," 28 *Harv. L. Rev.* 343, 445 (1915).

64 *Gertz,* 418 U.S. at 385 (White, J., dissenting); *Garrison v. State of Louisiana,* 379 U.S. 64, 67-69 (1964); *Curtis Publ'g v. Butts,* 388 U.S. 130, 147 (1967).

65 *Rosenblatt,* 383, U.S. at 92 (Stewart, J., concurring).

Santiago's hope for relief, beyond the significant barriers already erected in *Sullivan* and *Gertz*. In its effect, therefore, the Texas statute has all but prevented Santiago from entering that civilized place for redress–a court of law.

2. The Nature of the Governmental Interest

The State of Texas has no interest whatsoever in securing to its residents protections under the First Amendment to the U.S. Constitution. That is because such an interest is not a 'state' interest. Protection of rights under the Constitution falls upon the National Government, acting through this Court.[66] The concept of federalism requires that each sovereign level of government tend to its own business. The concept of supremacy requires that the states not interfere with the federal Constitution. "[T]here is a plain repugnance in conferring on one Government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."[67]

The Texas statute, on its face, purports to provide libel defendants with an additional measure of protection. Yet, any additional protections for the media--procedural or substantive---beyond those provided for in *Sullivan* and *Gertz*, have been roundly denied by this Court.

In *Calder v. Jones*,[68] was considered a California Supreme Court

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66 U.S. Cont. art. III, §1; art III, §2; art VI, §2; amend. X.

67 *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819).

68 465 U.S. 783 (1984).

ruling related to that state's long-arm jurisdiction over an out-of-state defendant in a libel action. The plaintiff was an actress who resided in California.[69] The defendant was The Enquirer, a Florida corporation.[70] When the defendant moved to quash service based on insufficient contacts with California, the Superior Court, in turn, "felt that special solicitude was necessary because of the potential 'chilling effect' on reporters and editors which would result from requiring them to appear in remote jurisdictions to answer for the content of articles upon which they worked."[71] The Enquirer's motion to quash was granted.[72] However, this Court found California's jurisdiction over The Enquirer to be proper on a different ground.[73] But this Court also took pains to "reject the suggestion that First Amendment concerns enter into the jurisdictional analysis."[74] The Court explained:

> the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law regarding such suits. To reinintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to

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69 *Id.* at 785.

70 *Id.*

71 *Id.* at 786.

72 *Id.*

73 *Id.* at 790-91.

74 *Id.* at 790.

> the constitutional protections embodied in the substantive laws.[75]

One of the "other contexts" where special procedural protections for libel defendants have been denied is in the context of summary judgment. The *Calder* Court cited *Hutchinson v. Proxmire*[76] for the proposition that, in defamation cases, "no special rules apply for summary judgment."[77]

The Texas statute circumvents normal summary judgment practice in Texas, which holds that denials of motions for summary judgment are not appealable orders.[78] In that sense, the statute fashions a "special rule"–one that is proscribed by *Proxmire* and *Calder.* And, although the 'jurisdictional' question in Santiago's case concerns appellate jurisdiction, not long-arm jurisdiction, it is 'jurisdictional' nonetheless, and therefore falls under the restrictions pronounced by *Calder.*

What *Calder* ultimately stands for is that the First Amendment balance has been struck. The competing interests in libel cases have already been accommodated. There is a boundary line; drawn by *Sullivan* and *Gertz.* And any attempt by anyone other than this Court to move the boundary, impermissibly encroaches upon one or the other interest at stake. In this case, the State of Texas has moved the boundary, and encroached upon Santiago's "strong and legitimate" interest in protecting his own good

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75 *Id.* [citations omitted].

76 433 U.S. 111 (1979).

77 *Calder,* 465 U.S. at 791.

78 *Jack B. Anglin v. Tipps,* 842 S.W.2d 266, 272 (Tex. 1992).

name.[79]

Although the Texas statute may be rationally related to someone's interest, it is not rationally related to any state interest. Therefore, the Texas statute is unconstitutional.

3. The Texas Statute Denies Santiago Equal Protection Under the Law.

On its face, the Texas statute creates two classifications:

> 1.) member of the electronic or print media;
> 2.) a person whose communication appears in the media.[80]

These two classes of persons are the ones honored by the Texas Legislature. Their rights are triggered when: 1.) their motion for summary judgment is denied; and 2.) the motion was based on, a claim or defense, arising under the First Amendment, or under the Texas Constitution. The right had to be conferred by statute, because it is an exception to the general rule.[81]

The statute creates more classifications by implication. The existence of a media defendant implies that there is a plaintiff, who has some cause of action against the media. The statute does not require, however, that the claim be a libel or defamation claim. Indeed, the statute has been successfully invoked where the plaintiff's claims against the media defendant were based on: "violation[s] of...the Texas Family Code, ...the

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79 *Gertz*, 418 U.S. at 348.

80 Tex. Civ. P. & Rem. Code §51.014(a)(6).

81 See note 78, *supra.*

Texas Penal Code, negligence, gross negligence, negligence per se, intentional infliction of emotional distress, and civil conspiracy."[82]

Although it was represented differently to the state Senators at their committee hearing,[83] plaintiffs have no access to the benefits of the statute. This distinction is not discernable by reference to the statutory language alone. But at least two intermediate appellate courts hold that the statute is not for plaintiffs[84]

A second implicit distinction is between libel plaintiffs and plaintiffs asserting other types of injury claims. The first category are subject to the statute, while plaintiffs in the second classification are not. Yet both are "similarly circumstanced," because both are raising claims for injury in Texas courts of general jurisdiction.[85] Therefore, under the Fourteenth Amendment, both classes should be treated alike.[86] But the Texas Legislature has created an arbitrary classification. And the classification violates Santiago's equal protection under the law.

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82 *A. H. Belo Corp. v. Cocoran,* 52 S.W.3d 375, 377 (Tex. App.–Houston [1st Dist.] 2001, no pet.).

83 Tr. 9:12-14; 38:2-5;

84 *Rogers v. Cassidy,* 946 S.W.2d 439, 422 (Tex. App.—Corpus Christi 1997, no writ hist.) *overruled in part on other grounds, Huckabee v. Time Warner Entertainment,* 19 S.W.3d 413 (Tex. 2000); *TSM AM-FM TV v. Meca Homes, Inc.* 969 S.W.2d 448, 452 (Tex. App.---El Paso 1998, pet. denied).

85 *Reed v. Reed,* 404 U.S. 71, 76 (1971).

86 *Id.*

None of the classifications mentioned are "suspect," because they are not based on race, alienage, or ancestry.[87] Therefore, rational basis review is the appropriate test for Santiago's Equal Protection claim.

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause."[88] Therefore, the burden is on Santiago to show that the classifications are not rationally related to any legitimate state purpose;[89] or, that the classifications are "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[90] The question boils down to: Why are libel plaintiffs not allowed to proceed to trial when they defeat defendants' summary judgement motions, but all other tort plaintiffs are permitted to proceed to trial in the same circumstances?

The only possible answer is that media defendants are deemed by the Texas Legislature to merit "special solicitude"[91] at summary judgement. However, *Calder* says that such solicitude is denied a defendant in the context of a defamation case, because it is a form of "double counting"-- that is, it applies the *Sullivan* or *Gertz* balance twice: once in the substantive law of the case, and again at a procedural juncture in the same

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87 *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312 & n.4 (1976).

88 *Parham v. Hughes,* 441 U.S. 347, 351 (1979).

89 *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 39-40 (1973).

90 *Parham,* 441 U.S. at 352.

91 *Calder,* 465 U.S. at 786.

case.[92]

The *Calder* prohibition, which simply recognizes that *Sullivan* and *Gertz* are the law, must hold true in Texas defamation cases, in the same way it holds true in the other forty-nine states. Texas can have no legitimate purpose in seeking to overrule the supreme law of the land by legislative enactment.[93]

> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgements of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery...'[94]

The Texas Legislature disrespects the basic tenets of our government. The law they passed must therefore be irrational. This Court should nullify it.

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92 *Id.* at 790.

93 See note 6, and note 67, *supra.*

94 *Cooper v. Aaron,* 358 U.S. 1, 18 (1958) (quoting *United States v. Peters,* 5 Cranch 115, 136 (1809)).

CONCLUSION

Santiago's writ should be granted because this Court is the only governmental body, now, that can prevent the continuing and "serious erosion of federal policy"[95] that the Texas statute represents.

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95 *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 483 (1975).

CERTIFICATE OF SERVICE

I certify that three copies of petitioner's Petition for Writ of Certiorari have been served by mail on the following parties:

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